No. 80-1703

JUN 2
ALEXANDER L.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

MISSISSIPPI COLLEGE, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

LEROY D. CLARK
General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

QUESTIONS PRESENTED

1. Whether the court of appeals failed to consider the affirmative intent of Congress when it held that the language and legislative history of Title VII of the Civil Rights Act of 1964 compel the conclusion that Congress intended Title VII to apply to employers that are religiously affiliated institutions of higher learning.

2. Whether enforcement of an Equal Employment Opportunity Commission subpoena requesting employment records from a religiously affiliated institution of higher learning involves the government in excessive entanglement with religion or impermissibly inhibits the free exercise of religion.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 5

Conclusion 13

TABLE OF AUTHORITIES

Cases:

Alexander v. *Gardner Denver Co.*, 415 U.S. 36 12

Dolter v. *Wahlert High School*, 483 F. Supp. 266 ..... 6, 7

EEOC v. *Pacific Press Publishing Association*, 482 F. Supp. 1291 ..... 6, 7

Engel v. *Vitale*, 370 U.S. 421 9

Griggs v. *Duke Power Co.*, 401 U.S. 424 12

Lemon v. *Kurtzman*, 403 U.S. 602 ..... 4, 8, 9, 10

McClure v. *Salvation Army*, 460 F. 2d 553, cert. denied, 409 U.S. 896 6

National Organization for Women v. *President and Board of Trustees of Santa Clara College*, 16 F.E.P. Cas. 1152 6

Newman v. *Piggie Park Enterprises*, 390 U.S. 400 12

NLRB v. *Catholic Bishop of Chicago*, 440 U.S. 490 5

PRECEDING PAGE WAS BLANK

Page

Cases—Continued:

Ritter v. *Mount St. Mary's College*, 23 F.E.P. Cas. 734 ..... 6, 7

Roemer v. *Board of Public Works of Maryland*, 426 U.S. 736 8

Sherbert v. *Verner*, 374 U.S. 398 13

Texas Department of Community Affairs v. *Burdine*, No. 79-1764 (Mar. 4, 1981) 11

Walz v. *Tax Commission*, 397 U.S. 664 8

Whitney v. *Greater New York Corporation of Seventh-Day Adventists*, 401 F. Supp. 1363 ... 6

Wisconsin v. *Yoder*, 406 U.S. 205 13

Constitution, statutes and regulations:

United States Constitution:

First Amendment 3, 5, 6, 9, 10

Establishment Clause 3

Free Exercise Clause 3

Civil Rights Act of 1964, Title VII, 42 U.S.C. (& Supp. V) 2000e *et seq.* :

Section 702, 42 U.S.C. 2000e-1 ..... 3, 4, 5, 6, 7, 8, 9

Section 703(e), 42 U.S.C. 2000e-2(e) 12

Section 706(b), 42 U.S.C. 2000e-5(b) 10

Section 710, 42 U.S.C. 2000e-9 2

National Labor Relations Act, 25 U.S.C. 151 *et seq.* 5

Page

Miscellaneous:

118 Cong. Rec. (1972):

pp. 1981-1982 7
p. 12864 7
p. 7167 7

H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963) 7

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1703

MISSISSIPPI COLLEGE, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A28) is reported at 626 F. 2d 477. The opinion of the district court (Pet. App. A30-A34) is reported at 451 F. Supp. 564. The findings of fact and conclusions of law entered by the district court (Pet. App. A35-A46) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1980 (Pet. App. A30). Petitions for rehearing were denied on November 12, 1980 (Pet. App. A48). On January 28, 1981, Justice Powell extended the time in which to file a petition for a writ of certiorari to and including April 11, 1981 (Pet. App. A49). The petition for a writ of certiorari was filed on April 11, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This subpoena enforcement action was brought in the United States District Court for the Southern District of Mississippi by the Equal Employment Opportunity Commission to enforce a subpoena issued by the Commission under Section 710 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-9. The subpoena was issued in aid of the Commission's investigation of a charge of discrimination filed by Dr. Patricia Summers, a former part-time faculty member at Mississippi College, an educational institution affiliated with the Mississippi Baptist Convention (Pet. App. A5). Summers alleged that the college had denied her a full-time faculty position because of her sex, and that the college had discriminated against women as a class in recruitment, promotion, and salary, as well as by maintaining segregated job classifications (*id.* at A7). She also alleged that the college had discriminated on the basis of race in recruiting and hiring (*ibid.*).

The Commission's subpoena sought the following information: (1) a list of members of the college faculty and administration, showing the race, sex, religion, job classification, and pay of each of them; (2) sources from which the college recruited faculty members; (3) any studies of faculty pay for the 1975-1976 school year; (4) all promotions of members of the faculty or administration for the 1975-1976 and 1976-1977 school years; (5) Summers' employment records and the employment records of William Bailey, the man who was awarded the full-time position for which she had applied; (6) all employment applications for the years 1975-1976 and 1976-1977; and (7) the most recent EEOC-6 report filed by the college (Pet. App. A8-A9 & n.3).

Based on Section 702 of Title VII, 42 U.S.C. 2000e-1,[1] the district court denied enforcement of the subpoena, holding that Title VII "has no application to a female in the employ of Mississippi College" (Pet. App. A31). In its findings of fact and conclusions of law, the court found that "Mississippi College is a religious educational institution and is an integral part of the Christian mission of the Mississippi Baptist Convention" (*id.* at A42). The court held that the Commission's assertion of jurisdiction over Mississippi College would potentially violate the Establishment Clause of the First Amendment because of the danger of entanglement of the government in religious affairs (*id.* at A44). Noting that the college has a policy of preferring Baptists for faculty positions, the district court also held that "the mere possibility of an EEOC investigation" would violate the Free Exercise Clause by inhibiting the college from following this policy "in instances subject to the Commission's scrutiny" (*id.* at A45).

The court of appeals reversed. First, the court held that the Commission has jurisdiction over charges of race and sex discrimination brought against religious organizations. The court held (Pet. App. A18; citation omitted):

> "The language and the legislative history of § 702 compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions or privileges of employment."

---

[1]Section 702 of Title VII, 42 U.S.C. 2000e-1, provides that, "This subchapter shall not apply * * * to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

The court of appeals also held that the application of Title VII to the employment practices of the college would not foster excessive government entanglement with religion[2] because of the "limited nature of the resulting relationship between the federal government and the College" (Pet. App. A25). The court noted (*ibid.*):

> Employment practices based upon religious discrimination are exempt under § 702 from the coverage of Title VII and the College could not be required to alter any of its other employment practices until it exercised its opportunity to justify those practices on first amendment grounds before a federal district court. Because no religious tenets advocated by the College or the Mississippi Baptist Convention involve discrimination on the basis of race or sex, an investigation by the EEOC will only minimally intrude upon any of the College's or Convention's religious beliefs. No ongoing interference with the College's religious practices will result from an EEOC investigation of the charge filed by Summers. Therefore, we conclude that imposing the requirements of Title VII upon the College does not violate the establishment clause of the first amendment.

The court of appeals further held that enforcement of the Commission's subpoena would not impermissibly inhibit the free exercise of religion. Given the exemption for religion-based discrimination by religious organizations contained in Section 702 of Title VII, 42 U.S.C. 2000e-1, the court held (Pet. App. A26) that Title VII would generally have a "minimal" impact on the college's exercise of its

---

[2]As the court of appeals noted (Pet. App. A22), there is no question that Title VII has a secular purpose and does not have the primary effect of either advancing or inhibiting religion. See *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). Thus, the only issue presented below was whether the application of Title VII in these circumstances fosters excessive government entanglement with religion.

sincerely held religious beliefs. In addition, the court held that the government's "compelling interest in eradicating discrimination is sufficient to justify the minimal burden imposed upon the College's free exercise of religious beliefs that results from the application of Title VII" (*id.* at A27).

The court of appeals remanded the case to the district court for further proceedings,[3] including a determination as to which portions of the Commission's subpoena should be enforced.

ARGUMENT

1. Petitioner contends (Pet. 12-15) that the decision below is inconsistent with *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979), in which the Court held that absent a showing of the "affirmative intention of the Congress clearly expressed," it would not construe the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, to cover employees of religious secondary schools, where a preliminary inquiry showed that the exercise of such jurisdiction would present serious First Amendment problems. Thus, the Court declined to rule on the constitutionality of the Act as applied to such religious schools.

The court below properly reached the constitutional question here because "[t]he employment relationship between Mississippi College and its faculty and staff is one intended by Congress to be regulated by Title VII" (Pet. App. A19-A20).[4] In reaching this conclusion, the court of

---

[3]The court of appeals held (Pet. App. A20-A21) that the district court should determine (among other things not relevant here) whether the college's decision not to consider Summers for the full-time vacancy was based upon her religion and therefore exempt under Section 702 of Title VII.

[4]Although the clear expression of congressional intent that religious employers would be covered by Title VII is sufficient to distinguish *Catholic Bishop*, the constitutional problems potentially raised with respect to the application of Title VII to such employers are also

appeals relied upon its prior decision in *McClure* v. *Salvation Army,* 460 F. 2d 553 (5th Cir.), cert. denied, 409 U.S. 896 (1972), in which the court considered a constitutional challenge to the application of Title VII to religious organizations. After thoroughly examining the language and legislative history of Title VII, the Fifth Circuit concluded in *McClure* that (460 F. 2d at 558):

> The language and legislative history of § 702 compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions or privileges of employment.

Moreover, the holding of the court below is consistent with the those of every court to have considered the application to religious organizations of Title VII's prohibition of discrimination on the basis of race, color, sex or national origin. *McClure* v. *Salvation Army, supra,* 460 F. 2d at 558; *Dolter* v. *Wahlert High School,* 483 F. Supp. 266, 268-269 (N.D. Iowa 1980); *Ritter* v. *Mount St. Mary's College,* 23 F.E.P. Cas. 734, 736 (D. Md. 1980); *EEOC* v. *Pacific Press Publishing Association,* 482 F. Supp. 1291, 1302-1306 (N.D. Cal. 1979) (appeal docketed Apr. 23, 1980); *National Organization for Women* v. *President and Board of Trustees of Santa Clara College,* 16 F.E.P. Cas. 1152, 1156 (N.D. Cal. 1975). See also *Whitney* v. *Greater New York Corporation of Seventh-Day Adventists,* 401 F. Supp. 1363, 1368 (S.D.N.Y. 1975).

---

considerably less serious than those posed by application of the National Labor Relations Act. As the court of appeals held (Pet. App. A19), and as we discuss below (see page 10, *infra*), the non-adjudicatory nature of Commission proceedings and the exemption provided by Section 702 for discrimination by religious employers on the basis of religion both minimize the potential for any conflict with the First Amendment.

In reaching the conclusion that Congress intended to prohibit religious organizations from discriminating in employment on the basis of race, sex or national origin, the courts have noted that unlike the National Labor Relations Act, which is silent with respect to the coverage of religious organizations, Section 702 of Title VII explicitly provides a limited exemption for religious employers from the prohibition of religion-based discrimination contained in Title VII. *Dolter* v. *Wahlert High School, supra,* 483 F. Supp. at 268-269; *Ritter* v. *Mount St. Mary's College, supra,* 23 F.E.P. Cases at 736-737; *EEOC* v. *Pacific Press Publishing Association, supra,* 482 F. Supp. at 1303. In providing this limited exemption, Congress clearly and unequivocally demonstrated its intent that religious employers should otherwise be covered by Title VII.

Congress' intent is also well evidenced by the legislative history of the statute. During consideration of Title VII in 1964, and of the Equal Employment Opportunity Act in 1972, Congress considered and rejected proposals which would have completely excluded religious employers from coverage under Title VII.[5] See *EEOC* v. *Pacific Press Publishing Association, supra,* 482 F. Supp. at 1301-1307 (detailed analysis of legislative history of Title VII coverage of religious employers). Furthermore, the section-by-section analysis of the 1972 amendments provides the clearest possible statement of affirmative congressional intent that religious organizations should be covered by Title VII (118 Cong. Rec. 7167 (1972); emphasis added):

> The limited exemption from coverage in this section for religious corporations, associations, educational institutions or societies has been broadened to allow

---

[5]H.R. Rep. No. 914, 88th Cong., 1st Sess. 10 (1963); Clark-Case substitute bill, amendment No. 871, 110 Cong. Rec. 12864 (1964); Ervin-Allen amendment No. 815, 118 Cong. Rec. 1981-1982 (1972).

> such entities to employ individuals of a particular religion in all their activities instead of the present limitation to religious activities. *Such organizations remain subject to the provisions of Title VII with regard to race, color, sex or national origin.*

The plain language of Section 702, together with the explicit confirmation of congressional intent contained in the legislative history, conclusively show the affirmative intent of Congress, clearly expressed, that Title VII apply to religious employers. The application to Mississippi College of Title VII's prohibition of race and sex discrimination in employment is therefore not inconsistent with this Court's decision in *Catholic Bishop.*

2. Petitioner also contends (Pet. 8-10) that application of Title VII to Mississippi College would cause an excessive government entanglement with religion and is therefore prohibited by the First Amendment under this Court's decision in *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971). In *Lemon,* the Court identified three factors to be considered in determining whether government entanglement with religion is excessive: the character and purposes of the institution that are affected; the nature of the aid to or burden upon the institution; and the resulting relationship between the government and the religious authority (403 U.S. at 614-615). See also *Roemer* v. *Board of Public Works of Maryland,* 426 U.S. 736, 761-765 (1976). Certain contacts between church and state are inevitable, of course, and the question whether entanglement is "excessive" is one of degree. See *Lemon* v. *Kurtzman, supra,* 403 U.S. at 614; *Walz* v. *Tax Commission,* 397 U.S. 664, 674 (1970). In the present case, the contact between church and state arises because of a national policy of promoting equal employment opportunity, a policy that also rests on a constitutional footing.

The court of appeals properly considered each of the factors identified in *Lemon* (Pet. App. A22-A25).[6] Although the court of appeals accepted the district court's characterization of Mississippi College as a "pervasively sectarian institution," the court also found that the enforcement of the Commission's subpoena and the general application of Title VII to the employment practices of the college would impose a minimal burden on its religious practices (Pet. App. A23-A24). Furthermore, the court found that the relationship between the federal government and the college that would result from the application of Title VII would be limited in nature (*ibid.*).

In reaching these conclusions, the court noted that the information sought in the Commission's subpoena did not directly implicate any religious practice of the college. While recognizing that enforcement of the subpoena might lead to further investigation or to an enforcement action, the court held that the safeguards provided in Title VII—the exemption for religion-based discrimination contained in Section 702 of Title VII and the college's right to a *de novo* hearing in federal court before any adjudication of a Title VII violation could occur—minimize the potential impact of Title VII enforcement on the college's religious practices and limit the scope and effect of the ensuing relationship between the federal government and the college (Pet. App. A23-A24). Thus, the government involvement

---

[6]The court of appeals analyzed this case in terms of both the Establishment Clause (see Pet. App. A22-A25) and the Free Exercise Clause (see *id.* at A25-A27). Although we agree with the conclusion of the court of appeals that enforcement of the Commission's subpoena would violate neither of the religion clauses, we do not believe that petitioner's claim should properly be viewed as raising any issue under the Establishment Clause in any event because the government action at issue here neither establishes a religion nor takes a step that could lead to such establishment. See *Lemon* v. *Kurtzman, supra*, 403 U.S. at 612; *Engel* v. *Vitale*, 370 U.S. 421, 430 (1962).

here was seen to fall far short of that "comprehensive, discriminating and continuing state surveillance" (*Lemon* v. *Kurtzman, supra,* 403 U.S. at 619) prohibited by the First Amendment.

Petitioner's contention that application of Title VII here would foster excessive government entanglement with religion is unfounded because it is based upon certain misconceptions concerning the operation of Title VII. By ignoring the limitations on the scope of Title VII as applied to religious employers, as well as the limitations placed on the authority of the Commission to enforce the statute, petitioner paints a distorted picture of the potential effect of the application of Title VII to the college's employment practices. At bottom, petitioner's argument is premised on the erroneous assumption (Pet. 8-9) that the Commission could assess the validity of the college's religious beliefs and order the college to adopt employment practices that conflict with those beliefs.

As the court of appeals recognized, however, the Commission's authority under Title VII is much more limited. Title VII does not subject religious employers to ongoing, comprehensive monitoring of the religious content of their practices. The Commission begins an investigation only after a charge of discrimination has been filed by an aggrieved person or by a Commissioner. Section 706(b) of Title VII, 42 U.S.C. 2000e-5(b). The initial inquiry into whether a religious employer discriminates on the basis of race, sex or national origin involves no religious question. Only if an employer asserts a religious reason as a defense does this issue arise at all. Even then, the employer would have a full opportunity to present in a federal court any defenses it may have—including defenses based on the First Amendment—before it could be required to alter its employment practices. The Commission has no independent enforcement power.

3. Petitioner's contention (Pet. 10-12) that application of Title VII would unreasonably burden the college's right to free exercise of religion is also based on a misunderstanding of the operation of Title VII. Thus, petitioner argues (Pet. 11) that "[m]odifying the College's employment policies to comport with Title VII would mean that religious considerations could no longer be a prime area of inquiry and consideration in the College's employment policies." This contention is wholly unfounded, as the court of appeals correctly held (Pet. App. A26). With respect to a religious employer, Title VII prohibits only those employment practices that constitute discrimination on the basis of race, color, sex or national origin. Because the college does not contend that any of its religious beliefs require discrimination on the basis of race, color, sex or national origin, there is no inherent conflict between Title VII and the college's free exercise of its religious beliefs.

Petitioner suggests, however, that the threat of a Title VII investigation will inhibit the college from freely choosing applicants for employment on the basis of religious considerations. Although the Commission's investigation of charges of race and sex discrimination may require that officials of religious organizations explain allegedly discriminatory actions, there is no reason to believe that the necessity for articulating the reasons for a challenged action will have a chilling effect, any more than the necessity for articulating valid business reasons will chill the actions of any other employer. It must be emphasized that even if a prima facie case of employment discrimination is established on the basis of a particular employment decision, an employer will not be liable under Title VII if he can articulate some legitimate, nonpretextual, nondiscriminatory reason for the action. See *Texas Department of Community Affairs* v. *Burdine*, No. 79-1764 (Mar. 4, 1981), slip op. 4-7. In the case of a religious employer, a showing that a particular

employment decision was made on the basis of an individual's religion, rather than race, sex, or national origin, would constitute such a defense. Similarly, Title VII's prohibition against facially neutral employment practices which have a disparate impact based on race, color, sex, or national origin, does not apply to practices that are justified by business necessity. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). An employer like Mississippi College, whose business is "to provide a liberal education permeated and guided by the Christian ideals of the Mississipi Baptist Convention" (Pet. App. A42), may maintain employment standards necessary to the accomplishment of that purpose, even if such standards have a disparate impact. Finally, Title VII permits discrimination on the basis of religion, sex, or national origin where they are bona fide occupational qualifications. See Section 703(e) of Title VII, 42 U.S.C. 2000e-2(e). Thus, if religious considerations precluded the employment of a woman to teach religion at a Baptist college (as the college claims), this practice may be defended as a bona fide occupational qualification.

When the provisions of Title VII are properly understood, it is clear that the court of appeals' holding that the application of the statute to petitioner will not significantly burden the college's free exercise of its religious beliefs is fully consistent with the principles established by this Court.

Finally, the court of appeals correctly held (Pet. App. A27) that the government's compelling interest in eradicating discrimination[7] "is sufficient to justify the minimal burden imposed upon the College's free exercise of religious beliefs that results from the application of Title VII." This holding is fully consistent with the principle enunicated by

---

[7]See, *e.g.*, *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968).

this Court that the government may impose reasonable restrictions on religiously based conduct where justified by a compelling governmental interest. *Wisconsin* v. *Yoder*, 406 U.S. 205, 219-220 (1972); *Sherbert* v. *Verner*, 374 U.S. 398, 403 (1963).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

LEROY D. CLARK
General Counsel
Equal Employment Opportunity Commission

JUNE 1981

DOJ-1981-06